No. 12273

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION, LTD., a non-profit corporation, etc., *et al.*,

Appellants,

vs.

RETAIL CLERKS UNION, LOCAL NO. 770, an unincorporated association, etc., RETAIL CLERKS UNION, LOCAL NO. 324, an unincorporated association, *et al.*,

Appellees.

APPELLEES' BRIEF ON APPEAL.

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APPELLEES' BRIEF ON APPEAL.

Introduction.

Appellants in this proceeding below filed an action for a declaratory judgment seeking a ruling that certain proposed contracts alleged to have been presented by the appellee labor organizations contained provisions which were unlawful under the Labor Management Relations Act of 1947 (29 U. S. C., Sec. 141 *et seq.*), and a further ruling that an exercise of the right to peacefully picket to induce appellants to sign such contracts would be unlawful and an unfair labor practice under said Act. This action was dismissed upon motion of the appellees by the United States District Court upon the grounds that the court does not have jurisdiction to entertain the action. (Order Dismissing Action for Want of Jurisdiction, United States District Court, Southern District, March 29, 1949.) Thereafter, the present appeal was taken.

Issues.

Stated briefly, the *primary issue* before this court is whether the court has jurisdiction over a matter in which the Labor Management Relations Act of 1947 (29 U. S. C., Sec. 141 *et seq.*), gives exclusive jurisdiction to the National Labor Relations Board. This is the main consideration involved herein and the basis upon which the United States District Court ruled that the cases could not properly come before it.

Other issues, minor in character, raised by appellants will also be considered. These issues are:

1. Does the Federal Declaratory Judgment Act apply herein?
2. Have the elements of Federal jurisdiction been met in this proceeding?

Summary of Arguments.

The District Court properly dismissed appellants' action for lack of jurisdiction. The National Labor Relations Board has *exclusive* jurisdiction to hear and determine cases alleging the commission of unfair labor practices as defined by Title I of the Labor Management Relations Act of 1947. The courts, both Federal and State, are absolutely without jurisdiction to redress by injunction *or otherwise* the unfair labor practices defined by the Act at the instance of a private party, as distinguished from the Board. Appellants' complaint prays judgment that appellee unions be declared in violation of Sections

8(b)(1)(A), 8(b)(2) and 8(b)(4)(A) of the Act and accordingly, the District Court did not have jurisdiction.

Appellants' action is a sham and frivolous one for the reason that although their complaint is based upon allegations that certain acts constitute unfair labor practices, appellants' brief (p. 8) expressly admits that *no* unfair labor practices have been committed.

Even assuming that unfair labor practices have been committed appellants openly admit that they have neither commenced nor exhausted the appropriate administrative remedy before the National Labor Relations Board and for this reason appellants have no cause for relief before a Federal Court.

The filing of the documents required of labor organizations by Section 9(f)(g) and (h) of the Labor Management Relations Act is *not* a prerequisite to an unfair labor practice charge by an employer, and appellants are therefore not deprived of their administrative remedy as they seem to allege.

The complaint of appellants presents a hypothetical state of facts which appellants assume will take place in the future, and asks the court for an advisory opinion regarding same. The case does not present an actual case or controversy upon which a judgment can define the rights of the parties and redress their wrongs.

None of the essential elements prerequisite to the exercise of federal jurisdiction, such as diversity of citizenship, jurisdictional amount in controversy, or statutory authority, are set forth in the complaint below.

ARGUMENT.

I.

The National Labor Relations Board Has Exclusive Jurisdiction to Determine Whether or Not Unfair Labor Practices Have Been Committed.

The District Court below was unquestionably correct in its decision to dismiss on the grounds that it lacked jurisdiction to entertain this proceeding. In substance appellants have alleged that the acts of appellees might constitute unfair labor practices under the Labor Management Relations Act of 1947. They have sought access to the Federal District Court to secure an advisory determination of unfair labor practice charges rather than to proceed directly to the National Labor Relations Board which is the administrative body expressly established to hear such charges in the first instance, as by Section 10(a) of the amended National Labor Relations Act provided.

In *Amazon Cotton Mill Co. v. Textile Workers Union of America* (decided April 1, 1948, C. C. A. 4th), 167 F. 2d 183, a labor union charged an employer with an unfair labor practice for the reason that the employer refused to bargain with the union. The union asked for an injunction requiring the employer to bargain and also for an award for damages. The employer moved to dismiss the suit for lack of jurisdiction in the court. The National Labor Relations Board was allowed to intervene, and the Board moved to dismiss on the ground that it had exclusive jurisdiction of the controversy.

The court held that the National Labor Relations Board was and remains with exclusive jurisdiction to determine whether or not unfair labor practices have been committed

and to afford relief against the continuation of such practices.

The *Federal District Courts are without jurisdiction to redress by injunction or otherwise the unfair labor practices defined in the Labor Management Relations Act.*

The aforementioned Section 10(a) of the Act provides that:

> "The Board is empowered as hereinafter provided to prevent any person from engaging in any unfair labor practices (listed in Section 8) affecting commerce."

In the case of *Bakery Sales Drivers Local Union v. Wagshal,* 333 U. S. 442, the Supreme Court declared:

> ". . . the law has been changed only where an injunction has been sought by the National Labor Relations Board, not where proceedings are instituted by a private party."

Thus we find that the Supreme Court in the quotation above cited affirms the proposition that a private party's exclusive remedy in matters involving unfair labor practices is with the National Labor Relations Board.

The *Amazon Cotton Mill case clearly affirmed the exclusive jurisdiction of the National Labor Relations Board over unfair labor practice cases.*

Quoting from the *Amazon* case:

> "We think it clear that the *District Court had no jurisdiction of the case.* Unless the Labor Management Relations Act of 1947 has had the effect of clothing each of the more than two hundred District Judges of the country with the powers over unfair labor practices vested in the National Labor Relations Board, and in addition the effect of virtually

> repealing the provisions of the Norris-LaGuardia Act limiting the use of injunctions in labor cases, the injunction granted by the lower court cannot be sustained. We do not think that the Labor Management Relations Act was intended to have or does have that effect."

Quoting further from the *Amazon* case, the Court of Appeals there held that the District Court did *not* have jurisdiction, stating that it was—

> ". . . perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that Act was 'to establish a single paramount administrative or quasi judicial authority in connection with the development of Federal American law regarding collective bargaining'; that the only rights made enforceable by the Act were those determined by the National Labor Relations Board to exist under the facts of each case; and that *the Federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined.*"

The court in the *Amazon* case held that the Taft-Hartley Act was passed for the purpose of providing a complete and exclusive forum for the investigation, hearing and settlement of controversies over acts deemed to be unfair labor practices affecting interstate commerce.

Congress has provided in the Labor Management Relations Act a special administrative agency for the exclusive administration of a law which regulates in detail the conduct of labor management relations. Therefore, neither a United States District Court nor a State has any legal right to infringe upon the exclusive jurisdiction of the National Labor Relations Board by entertaining an action

brought by a private party to prevent alleged "unfair labor practices" of employers or unions. The National Labor Relations Board was and remains with exclusive jurisdiction to determine whether or not unfair labor practices have been committed and to afford relief against the continuation of such practices. The Federal District Courts are without jurisdiction to redress by injunction *or otherwise* the unfair labor practices defined in the Labor Management Relations Act.

Amazon Cotton Mill Company v. Textile Workers of America (C. C. A. 4th, 1948), 167 F. 2d 183.

II.

Many Other Recent Decisions, Both Federal and State, Support the Proposition That the National Labor Relations Board Has Exclusive Jurisdiction in Unfair Labor Practice Matters.

The case of *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Dixie Motor Coach Corporation* (C. C. A. 8th, Nov. 26, 1948), 170 F. (2d) 902, reversing the United States District Court for the Western District of Arkansas, was an action brought in the Federal District Court by the Dixie Motor Coach Corporation against the defendant union to obtain an injunction against the establishment and maintenance by the union of a picket line around the bus depot operated by the plaintiff. This picket line was maintained because the plaintiff was doing business with a certain motor carrier. The trial court issued a permanent injunction against the defendant labor union. Defendant appealed and the National Labor Relations Board moved for

leave to intervene, pointing out that the Board has exclusive jurisdiction to remedy the violations complained of. The Court of Appeals found that the District Court was in error and that Section 10(1) of the amended Act authorizes injunctive relief against the conduct described in Section 303 only upon the petition of the National Labor Relations Board. The Act neither expressly or impliedly authorizes a suit by a private party for injunctive relief against such conduct. *A Federal District Court has no inherent power to grant relief against such conduct in a suit brought by a private party.*

In *International Longshoreman's & Warehouseman's Union v. Sunset Line and Twine Co.* (U. S. District Court in the Northern District of California, April 8, 1948), 77 Fed. Supp. 119, it was stated that in a situation where the union was seeking an injunction and damages because the employer refused to bargain with the union after having done so for ten years, that the National Labor Relations Board has exclusive powers to determine unfair labor practices.

Also in the case of *Gerry of California v. Superior Court,* 32 Cal. (2d) 119, 194 P. (2d) 689, (decided by the California Supreme Court June 16, 1948), the court followed the same line of reasoning as the Federal cases above cited. In that case there was an attempt to force the Superior Court to assume jurisdiction by a writ of mandamus. The Gerry Company manufactured women's clothing and 80% of its business was in interstate commerce. The union involved attempted to organize the

company's employees. All but one of the employees filed a petition for election and certification with the National Labor Relations Board, and the company consented to the election. The uncertified union then instituted a picket line. No complaint was filed by the company with the Board, but a complaint was filed with the Superior Court for an injunction and damages. This was refused on the grounds that the Board had exclusive jurisdiction, and that the State courts were entirely without jurisdiction in the matter.

In re DeSilva, 33 A. C. 44 (decided November 16, 1948), which is the forerunner to the instant proceeding before this court, was a case in which the attorney for the appellants herein made his first attempt to evade the jurisdiction of the National Labor Relations Board by attempting to utilize the State courts. Having failed there, counsel is now attempting to utilize the Federal courts for the same purpose through the novel approach of a complaint for Declaratory Judgment. In that case the Sureway Drug Company employed two pharmacists and eight clerks who were not organized into any labor organization. When the union subsequently began to organize these employees, and secured representation authorization cards from a majority of them, the company discharged such employees and refused to sign the collective bargaining agreement proferred by the union. Thereupon the union commenced to picket. Subsequently the company petitioned the Board for certification of the union as the representative of the employees, but the petition was dismissed on the grounds

that the union was not in compliance with Sections 9(f)(g) and (h) of the Act. Action was filed by the Drug Company in the Superior Court to enjoin the picketing and for damages, and the court issued a preliminary injunction. When picketing continued, DeSilva was convicted of contempt of court. The Supreme Court upon review of this judgment on application for a writ of habeas corpus held that the sole purpose of the lawsuit was to obtain equitable relief for an object declared unlawful under the National Labor Relations Act. The court reaffirmed the *Gerry* doctrine above cited that:

> "the declared intent and purpose of the Labor Management Relations Act of 1947 was to vest exclusive jurisdiction in the National Labor Relations Board over unfair labor practices, affecting interstate commerce . . ." and ". . . the Act deprived the Superior Court of original equitable jurisdiction in such cases."

It was further held that:

> "No distinction could be made here because the National Labor Relations Board had denied the company's petition for certification of a union representative. By the denial the Board did not divest itself of jurisdiction to determine whether the defendants were committing unfair labor practices affecting interstate commerce, which could be enjoined pursuant to the procedure provided by the Act. Its exclusive jurisdiction over that matter had not been invoked by the plaintiff."

III.

Appellants' Complaint Is Based Upon Alleged Unfair Labor Practices by Appellee Unions But Appellants' Brief Declares No Unfair Labor Practices Have Been Committed.

Paragraphs XVIII, XIX and XXIII of the appellants' complaint definitely allege the commission of unfair labor practices on the part of the appellee unions herein as well as do the demands that they be declared guilty of such practices, in paragraphs 3, 4 and 8 of the prayer in the aforementioned complaint.

Section 10(a) of the Labor Management Relations Act of 1947 gives exclusive jurisdiction to the National Labor Relations Board over such alleged unfair labor practices as heretofore cited in this brief and as further borne out by the decisions quoted above.

Appellants' position before this court can only be described as peculiar. In their prayer for declaratory judgment they ask that the unions be declared guilty of acts constituting unfair labor practices, but on page 8 of their brief they declare that no unfair labor practices have been committed.

If there have been no unfair labor practices then indeed the complaint is utterly sham and frivolous. If however, as is the fact, the entire complaint is based upon allegations of unfair labor practices, then appellants have failed to exhaust their administrative remedies and therefore have *no* standing before any court, Federal or State, as the courts are without jurisdiction. In addition to the cases already quoted, appellees cite, *Meyers v. Bethlehem Steel,* 303 U. S. at 50-51; *Newport News v. Schauffer,* 303 U. S. 54, to support their position.

IV.

The Federal Act Does Not Make the Filing of the Documents by Labor Organizations a Prerequisite to the Exercise of Jurisdiction by the Board on a Charge of Unfair Labor Practices.

The reasoning in the case of *International Longshoreman's & Warehouseman's Union v. Sunset Line & Twine Company, 77* Fed. Supp. 119, is *apropos* to the contention of the appellants herein.

Quoting from that case:

> "It is equally clear that the Board has exclusive power to determine whether unfair labor practices have been committed and to issue appropriate orders upon such determination . . . Plaintiff would have this court discover jurisdiction by implication. The complaint sets forth no particular section of the Act upon which reliance is placed. It is broadly alleged that plaintiff is engaged in interstate commerce and that unfair labor practices have been perpetrated by defendants."

The court quoting out of *Styles v. Local 74 etc.,* 74 Fed. Supp. 499, said:

> "This tribunal has no jurisdiction to settle the controversy between the contesting parties. The Congress has seen fit to place jurisdiction with the National Labor Relations Board and thereafter by adequate procedural provisions in the Circuit Court of Appeals and the Supreme Court."

The plaintiff in the *Longshoreman's* case further asserted:

> "It must have been the intent of Congress that if the labor organization chose not to avail itself of the facilities of the National Labor Relations Board be-

cause it preferred not to file the affidavits and documents required, then another forum should be provided where the employers unfair labor practices could be subject to scrutiny and restraint."

The court said:

"This latter contention on the part of plaintiff has some degree of novelty, but cannot be accepted as a canon of interpretation or construction either with respect to the intent of the legislators or as to the wisdom or purposes of the Act . . . It is manifest that plaintiff has not seen fit to invoke the jurisdiction of the National Labor Relations Board in the manner clearly provided for. This suit represents a circuitous method or means of avoiding or attempting to avoid the clear mandate of the statute. To say that the United States District Courts, under such circumstances, have concurrent jurisdiction is to create therein a forum for every conceivable labor management grievance which properly reposes within the confines, province and exclusive jurisdiction of the Board."

It was observed in the *Gerry* case, *supra,* that since the Federal Act *does not make the filing of documents by labor organizations a prerequisite to the exercise of jurisdiction by the Board* on a charge of unfair labor practices presented by the employer, *there is no inadequacy of the available administrative remedy* merely because of the failure of the union to file the documents.

It is sufficient to note that in connection with the above that an inspection of the appellants' complaint and brief will divulge a pursuance of the techniques relied upon by the unsuccessful parties in the *Longshoreman's* and *Gerry* cases.

V.

The Appellants Have Misquoted and Misstated Certain Cases Cited by Them.

Appellants cite on page 8 of their brief the cases of *Rice & Holman v. United Electrical Workers,* 16 C. C. H., Labor Cases, Par. 65,087, ... N. J. E. ....., (decided March 30, 1949), and *Int'l Union United Automobile Workers, A. F. of L., Local 232 v. Wisconsin Employment Relations Board,* 336 U. S. 245, 93 L. Ed. Adv. Op. 510 (decided February 28, 1949), to support their contention that the employers should be able to obtain declaratory relief in this situation. Each of these cases concern themselves with issues wholly foreign to the instant proceedings. In the *Rice & Holman* case the picketing was enjoined at the same time that an unfair labor practice charge was pending with the Board. However, the court in that case found as a fact that the pickets had indulged in violence, abusive and foul language, blocking of entrances, and massing of pickets. Such conduct is subject to restraint and is separate and distinct from the question of any unfair labor practice under the Act. Unfair labor practice charges are within the exclusive jurisdiction of the National Labor Relations Board. There is absolutely nothing in the instant case at all comparable. In fact, as admitted by the appellants, there has been no picketing of their drug stores at the time of the bringing of this action, and of course, no violence or other unlawful conduct.

The other case cited, *Int'l Union United Automobile Workers, A. F. of L., Local 232 v. Wisconsin Employment Relations Board* is completely distinguishable from the case presented herein by the appellants. The facts in the cases are not even remotely related. The *Wisconsin*

case was a case in which the State of Wisconsin had enacted a State labor law prohibiting certain kinds of work stoppages and concerted activities. The court there held that the Labor Management Relations Act did not preclude the State from exercising police powers and regulating the conduct of certain intrastate labor relations based upon a Wisconsin law even though the conduct did affect commerce. There is no comparable California law, and the appellants herein in fact have based their entire case upon the Federal Labor Act.

VI.

Appellants' Complaint and Brief Are at Variance in That the Complaint Alleges Commerce as Jurisdictional Grounds and the Brief Argues That Appellants Are "Small Businesmen" Not Affecting Commerce.

As a further argument supporting their contentions that the District Court has jurisdiction because they have no administrative remedy, appellants declare that because they are "small businessmen" the National Labor Relations Board will refuse to take cognizance of their charges as their activities do not affect commerce and it would not effectuate the purposes of the Act, citing the cases of *Matter of H. W. Smith, d/b/a A-1 Photo Service,* 83 N. L. R. B. No. 86 (decided May 13, 1949), and *Matter of Fred Montgomery, d/b/a Periera Studio,* 83 N. L. R. B. No. 87 (decided May 13, 1949). Are we to regard the appellants' allegation in their complaint that they are in interstate commerce? Or, are we to regard the argu-

ments in appellants' brief that they are not in commerce? *Appellees submit that this is most confusing, not knowing which allegation to answer.*

If it is true, as argued in the brief, that they do not effect commerce, and that it would not effectuate the purposes of the Act for the Board to take jurisdiction, appellants have stated themselves out of court. Their entire complaint is based upon their allegations that defendant unions attempted to force them to violate the Act. Specifically they contend that defendants tried to force them to place professional employees in a bargaining unit with non-professional employees in violation of Section 9(b)-(1); that defendants attempted to force them to violate Section 8(a)(3); and that defendants violated Sections 8(b)(1), 8(b)(2) and 8(b)(4)(A) of the Act.

If appellants are not covered by the provisions of the Act because their activities are too remote and insubstantial to have an effect upon commerce, then none of the alleged acts of defendants could possibly have been in violation of the Act or any other State or Federal law, and therefore, appellants have no cause of action or case for relief. Simply stated, if appellants are correct that they are not covered by the Act, then defendants have done no wrong.

VII.

The Federal Declaratory Judgments Act Is Not Applicable to the Situation Herein.

It is elementary that the Declaratory Judgments Act does not enlarge the jurisdiction of the Federal courts. Congress has provided for the matters over which the Federal courts take jurisdiction, and it has likewise outlined the jurisdiction of the National Labor Relations Board.

Before the Act will apply there must be an actual case or controversy shown. The courts will not render an advisory opinion; and further, one of the usual bases of jurisdiction must be shown to exist. (Constitution of the United States, Art. III; *Muskrat v. United States,* 219 U. S. 346; *Putnam v. Ickes,* 78 F. 2d 223; *Continental Casualty Co. v. National Household Distributors,* 32 Fed. Supp. 849.)

The danger or dilemma of the appellants must be present, not contingent upon the happening of hypothetical future events,—although it may involve future benefits or disadvantages—and the prejudice to his position must be actual and genuine and not merely possible or remote to entitle appellant to the rendition of a declaratory judgment. (Borchard, Declaratory Judgments, p. 56.)

The entire action here is based upon assumed and hypothetical possible future occurrences, none of which are in actual fact endangering or threatening appellants at this time. Appellants present to this court a hypothetical state of facts which supposedly will exist in the future, and ask this court to rule that *if* these facts did exist that the

unions would have committed unfair labor practices and that the contracts would be unlawful. In other words there is no existing case or controversy upon which the court may exercise its proper judicial functions.

It is also a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. (*Meyers v. Bethlehem Steel Corp.,* 303 U. S. at pp. 50-51.) Further, it has been held that the Declaratory Judgment Act should not be used procedurally for the purpose of selecting a forum. (*Commercial Casualty Ins. Co. v. Fowles,* 154 F. (2d) 884.)

Appellants herein seek to avoid the clear holdings of the *Amazon Cotton Mills, Dixie Greyhound Bus Lines, International Longshoreman's Union* cases, *supra,* among others, that Federal courts have no jurisdiction of actions alleging the commission of unfair labor practices by a novel attempt to bring their action under the Declaratory Judgments Act. Both Federal and State court decisions have repeatedly denied injunctive relief in such situations, both because of the provisions of the Norris-LaGuardia Act and because the National Labor Relations Board has exclusive jurisdiction.

The Declaratory Judgments Act does not enlarge the jurisdiction of the Federal courts. If these courts have no jurisdiction of an alleged cause for relief by injunction, they cannot accomplish the same result by declaratory relief. A declaratory judgment must be denied appellants for the same reasons that injunctive relief would be denied.

We call the court's attention to the language of *Davis v. American Foundry Equipment Co.,* 94 F. (2d) 441, quoted

in appellants' brief, construing the Declaratory Judgments Act, wherein it was stated by that court that:

> ". . . to exercise jurisdiction under the Declaratory Act is *not to extend* the jurisdiction of the court, but merely to hasten the day when that jurisdiction may be invoked . . ."

It is fundamental that there must be Federal jurisdiction before any remedy may be asked of the court, and if the court lacks jurisdiction, as it clearly does in regard to unfair labor practice controversies, then no form of Federal action is available save the appropriate administrative proceedings.

VIII.

The Elements of Federal Jurisdiction Have Not Been Met by Appellants.

There is no showing by appellants herein that the jurisdictional amount of $3,000 exclusive of interests and costs usually required before the Federal Courts will consider a Federal question, has been met. Nor is there a showing of diversity of citizenship, nor the fact that such jurisdiction is secured pursuant to a Federal Statute.

The amount in controversy must be measured by the pecuniary consequence to either party to an action. (*Thompson v. Gaskill,* 62 Sup. Ct. 673.) Here there is neither a case or controversy nor is there a showing of pecuniary damage to the appellants. The pecuniary result which measures the presence or absence of the jurisdictional amount must be such as will be directly produced

by the litigation. (*Ronzia v. Denver,* 116 F. (2d) 604.) There being merely a reliance upon the possibility of hypothetical future events occurring, and the instant request for declaratory relief being merely advisory in nature, there is obviously no jurisdictional amount here involved. If the matter in controversy is not solel yascertainable in money it must be capable of being valued in money.

As was pointed out in *New York Life Insurance Co. v. Johnson,* 225 Fed. 958, and in *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U. S. 283, it is not the amount claimed in the prayer for relief which determines the jurisdiction of the court, if the unmistakable fact and the legal certainty is that the plaintiff could not have had any reasonable expectation that plaintiff could recover, exclusive of interest and costs, an amount within the jurisdiction of the court.

Further to be considered briefly here and worthy of only a short discussion is the appellants' argument that the courts shall assume equitable jurisdiction. It is basic and axiomatic that equity will never assume jurisdiction unless the law does not afford an adequate remedy. Here the Labor Management Relations Act clearly provides for a remedy in Section 10(a) of that Act.

Moreover, in view of the statutory character of the United States District Courts, there can be no serious contention made for the assertion of a supposed "equitable" jurisdiction, absent the essential elements of Federal jurisdiction prescribed by Congress.

Conclusion.

Appellants came before the District Court below with a request that the court declare certain alleged acts to be unfair labor practices as defined by Title I of the Labor Management Relations Act of 1947.

It is unquestionable that appellants brought their proceeding before a court that lacked jurisdiction to hear the cause. Appellants failed to avail themselves of the administrative remedies provided for such cases before the National Labor Relations Board. In an unbroken line of cases, cited by appellees herein, namely, the *Amazon Cotton Mills* case, *Dixie Motor Coach Co.* case, *International Longshoreman's* case, *Bakery Sales Drivers* case, *Gerry* case and the *DeSilva* case, both Federal and State courts have clearly ruled that the National Labor Relations Board has exclusive jurisdiction to hear in the first instance, charges by private parties of the commission of unfair labor practices. Each of these decisions denied relief to private parties on the grounds that the courts did not have jurisdiction. Appellants' cause falls squarely within the rule of these cases and the dismissal below was proper and legally correct.

Evidently realizing this basic weakness in their case appellants devoted their entire brief and argument to an attempt at establishing the alleged existence of factors which might be considered reasons for the courts taking jurisdiction regardless of the rule as set forth by appellees.

Appellants first claim that they have no remedy before the Board. To substantiate this claim they cite a dismissal of an employer petition for certification of a union because the union was not in compliance with Section 9(f),

(g) and (h) of the amended Act. But, appellants admit that the employer in question, Mr. Simon, had *not* exhausted his administrative remedy as he never filed unfair labor practice charges with the Board. He failed to obtain relief in the State court (*In re DeSilva, supra*), for this very reason. Appellants are attempting through declaratory relief to accomplish the same end sought in the *DeSilva* case and must necessarily fail in this proceeding for the same reason.

Although appellants' complaint distinctly alleges and demands relief from unfair labor practices as defined by the Act, appellants next, with remarkable facility, state in their brief that no such practices have in fact been committed. Appellees submit again to this court that upon appellants' own contradictory positions taken, in a stubborn attempt to avoid the remedies given them by law, there is no cause for relief, for there is no justiciable controversy upon which a declaratory judgment can be rendered.

In fact, the contradictory positions taken show there is nothing upon which a complaint may properly be made before any forum whether judicial or administrative, and this action may truthfully be said to be a sham, requesting only an advisory opinion upon hypothetical facts.

As an additional argument to support their contention of lack of remedy, appellants cite the National Labor Relations Board holding in the *A-1 Photo* case to the effect that the Board does not find small retail establishments to "affect commerce," since they are of remote and insubstantial effect. Appellants by their admission are "small businessmen." But, the fact that they are engaged in businesses which do not "affect commerce" most cer-

tainly does not entitle them to bring unfair labor practice charges before the Federal courts. Appellants' proposal here appears to be to the effect that while the Board has jurisdiction of all unfair labor practice charges involving employers who are engaged in commerce the Federal courts have jurisdiction of similar charges involving employers who are not engaged in commerce.

Quite obviously this proposal (while somewhat imaginative), is utterly unsound and without any foundation whatsoever either legal or equitable. The fact is that inasmuch as appellants are not engaged in and do not "affect" interstate commerce, no legal wrong is being done them nor can be done them in the conceivable future.

An activity of a labor organization which falls within the definitions of Section 8(b) of the Act is an unfair labor practice if, and only if, such activity has:

> ". . . the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce." (Labor Management Relations Act, 1947, Title I, Section 1.)

As the activities of appellees in connection with appellants' businesses concededly do not "affect commerce" then none of these activities, regardless of their character, can by any possibility be declared to be an "unfair labor practice" (as demanded herein) under Section 8(b) of the Act. Appellants complain that they have no remedy, but what is there to remedy when there can have been no wrong? Appellants have literally stated themselves out of court by alleging violations of a law which does not, by their own admission, apply to them, and is in fact therefore non-existent as to them.

Appellants have also appealed to the equitable powers of the court to support their case. They argue that, (a) the Act was intended to cover the instant situation, and (b) that the Board affords no remedy, and then conclude that under its general equity jurisdiction the District Court should have retained the matter.

If unfair labor practices *affecting commerce* have actually been committed the National Labor Relations Board affords appellants a complete and the *exclusive* forum for their redress. Appellants need not appeal to the equitable jurisdiction of the court and in fact the court does not have such jurisdiction.

Where there exists an adequate remedy at law, equity will not hear the case. This principle, too elementary to need amplification, is the answer to the appellants' contentions.

Before the court may exercise its equitable powers, it must have jurisdiction over the parties and the cause of action. Appellants argue as noted above, that jurisdiction should be granted because the Board affords them no remedy. This alleged lack of remedy is based upon three separate contentions, (a) that no unfair practices have at this time been committed, (b) that appellants are "small businessmen" and without the scope of the Act and (c) that the Act does not cover the instant situation.

If no unfair practices have been committed, or if appellant employers are not engaged in commerce, then aside from all other consideration, there is no equitable cause for in the one case there is no wrong to redress and in the other the law relied upon does not apply to these parties and they cannot invoke it. Appellants cannot seri-

ously suggest to the court that its *equitable* powers can *extend* the Taft-Hartley Act to businesses *not* engaged in commerce despite the fact that the law was intended for and expressly limited to practices affecting commerce, yet that is precisely what they appear to argue. Does a Federal court "sitting in" equity have the power to change any given law of the land? Seemingly, appellants would say yes.

Further, to show the desperateness of their "snatching at straws," the appellants in their complaint take one position, that they are engaged in interstate commerce, in order to invoke the jurisdiction of the Federal courts, and in their brief take a completely contrary position, saying they are not in commerce.

The final contention of appellants is that the acts of the unions would compel appellants to coerce employees in violation of Section 8(a)(1) and that as this is not declared an unfair labor practice thus giving appellants a Board remedy, the equitable jurisdiction of this court will apply. The short answer to this is that appellants have made no attempt to obtain a determination of whether such acts actually are or are not unfair labor practices under the Act. Appellants say the Act does not make such acts unfair, but until a ruling of the Board is sought and obtained, appellants' statement is but a mere conclusion and entitled to no weight. We note that this assertion was supported by no authority and was preceded by an admission that charges had never been filed.

Appellants' then, have shown no grounds for the exercise of equitable jurisdiction by the court, and have failed to use the legal remedy provided.

Appellants fail to state a case or controversy within the accepted scope of the Declaratory Judgments Act. They ask merely for an advisory opinion of the court, which, of course, is not within the judicial powers of any Federal court.

Throughout their brief, as we have pointed out, appellants have admitted themselves to be without the scope of the Labor Act. For this reason they have failed to state a case arising under a Federal statute and as there is no diversity of citizenship in this case, appellants fail to bring themselves within the jurisdictional requirements of the Federal courts. Furthermore, beyond mere allegation, there has been no showing of the requisite jurisdictional amount.

Finally, if this proceeding is based upon the provisions of the Labor Management Relations Act, jurisdiction over the case lies solely with the National Labor Relations Board.

The complaint and brief herein have repeatedly demonstrated that:

(1) Appellants have no cause for relief for the reason that they have no actual case or controversy which can be adjudicated.

(2) Appellants, though asking for relief from "unfair labor practices" have admitted that no such practices have been or are presently being committed.

(3) Appellants are not within the scope of the Commerce Clause and therefore are not entitled to the relief for which they pray because the activities of the appellees are not regulated by the Federal Labor Management Relations Act and are not in violation of the Act.

(4) Even assuming the provisions of the Act to be applicable, and the activities of the appellees to be prohibited practices, the Federal courts have no jurisdiction over this case, *exclusive* jurisdiction then being with the National Labor Relations Board.

It is respectfully submitted to this court by the appellees for the reasons set forth in this brief that the dismissal of this proceeding by the District Court below for lack of jurisdiction should be affirmed.

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